IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ESTATE OF ARMENTIA CHATMON, a/k/a ARMENTER CHATMON, p/k/a "BO CARTER" or "BO CHATMON" **Plaintiff,** **v.** **WARNER MUSIC GROUP CORP., SONY/ATV MUSIC PUBLISHING, EMI MILLS MUSIC, INC., RHINO ENTERTAINMENT COMPANY, d/b/a RHINO RECORDS, VIACOM, INC., d/b/a VIACOM INTERNATIONAL, INC., FOLKWAYS MUSIC PUBLISHERS, INC., HAL LEONARD LLC, J.W. PEPPER & SONS, INC., ERIC CLAPTON, AND JOHN DOE NOS. 1-10.**	)	**No. 3:16-cv-02722** **Judge Waverly Crenshaw** **Mag. Judge Barbara Holmes**

MEMORANDUM OF LAW IN SUPPORT OF J.W. PEPPER & SON, INC.'S MOTION TO DISMISS UNDER RULES 12(b)(2) and 12(b)(3)

J.W. Pepper & Son, Inc.[1] ("Pepper") submits this Memorandum of Law in support of its Motion to Dismiss under Rules 12(b)(2) and 12(b)(3).

FACTUAL ALLEGATIONS FROM THE COMPLAINT

The only connection to this Judicial District is the location of Plaintiff's counsel. None of the Defendants are alleged to maintain their principal place of business in Tennessee and none are alleged to be incorporated here. See Complaint (Doc. 1) at ¶¶ 8(a) – 8(i). Nor is the Plaintiff alleged to have any connection with this Judicial District: the estate was probated in Shelby County and the executor is a resident of Mississippi. Id. at ¶¶ 6-7.

[1] Improperly identified in the Caption and the Complaint as J.W. Pepper & Sons, Inc.

Without specifying whether the personal jurisdiction over each Defendant is founded upon general or specific grounds, the Complaint alleges – solely "upon information and belief" – that each of the Defendants transacts business across the country, including in Tennessee. Id. at ¶ 5. The Complaint alleges that "Defendants expected or should have reasonably expected their acts . . . to have consequences in the State of Tennessee," id., but alleges nothing more.

Alleging only a conclusion of law without any specific facts, the Complaint asserts that venue is proper "pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1400(a)." Id. at ¶ 3.

Although the Complaint includes specific allegations that certain acts took place in New York, see id. at ¶ 33, it contains no similar allegations concerning Tennessee, much less concerning this Judicial District. It alleges that Plaintiff is owed royalties, but includes neither allegations that such royalties would be sent to any address within this Judicial District nor allegations that any Defendant generates royalty payments from a place other than its principal place of business (outside this state). The only specific communications between Plaintiff and any Defendant concerning royalties that is referenced in the Complaint is between an Atlanta attorney and the New York office of Defendant Viacom. See Doc. 1-14 (PID # 86-87).

The Complaint uses a net rather than a spear to conflate allegations about each Defendant. See id. at ¶ 8(j) (noting that Plaintiff refers to all 10 Defendants "conjunctively" by adding an "s" to the word "Defendant"). While the Complaint includes multiple allegations about the creation of various sound recordings and audio/visual recordings of a musical composition entitled *Corrine, Corrina* ("Original Song"), see Complaint at ¶¶ 12, 18-36, and includes allegations about a songbook published by Defendant Hal Leonard, id. at ¶ 37 (referred to in the Complaint as "Songbooks"[2]), the only specific allegations about Pepper are found in two paragraphs: 1(h) and 9. The first specific allegation is that Pepper is incorporated in Pennsylvania, maintains its principal place of business in Pennsylvania and "is in the business of publishing written sheet music and songbooks." Id. at ¶ 1(h). The only other specific allegation is that Pepper published and sold the sheet music for the Original Song that was written sometime prior to the fall of 1928. Id. at ¶ 9.

LEGAL ARGUMENT

A. Lack of Personal Jurisdiction

The party invoking the court's authority bears the burden of proving that the court has jurisdiction "over each defendant independently." See Beydoun v. Wataniya Rest's. Holding, Q.S.C., 768 F.3d 499, 504 (6th Cir. 2014).

In cases raising a federal question, whether this Court may exercise personal jurisdiction over a particular defendant depends on the specific limitations of Tennessee's long-arm statute and the constitutional principles of due process. Bridgeport Music, Inc. v. Still N The Water Pub'g, 327 F.3d 472, 477 (6th Cir. 2003). Tennessee's long-arm statute has been consistently construed to extend to the limits of federal due process, and, therefore, the two inquiries are merged and the Court need only determine whether exercising personal jurisdiction over Pepper is consistent with federal due process requirements. Id.

Personal jurisdiction may be general or specific. Youn v. Track, Inc., 324 F.3d 409, 417-18 (6th Cir. 2003). General jurisdiction exists where the defendant's contacts with the forum are substantial" and "continuous and systematic," id., and is usually limited to a corporation's place of incorporation or its principal place of business. Daimler AG v. Bauman, 571 U.S. ___, 134 S.

2 The Complaint defines the term "Songbooks" in paragraph 37 and attributes their publication to Defendant Hal Leonard; this is distinguishable from the songbooks (lower case) referenced in paragraph 8(h) and attributed to Pepper.

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Ct. 746, 754 (2014). Here, the Complaint includes no allegations that would support general jurisdiction over Pepper.

Unlike general jurisdiction, which may be proper even when the cause of action does not arise out of the defendant's activities in the forum state, "specific jurisdiction exists when a defendant has minimum contacts with the forum state *and the cause of action arises out of those contacts*." First Cmty. Bank, N.A. v. First Tennessee Bank, N.A., 489 S.W.3d 369, 388 (Tenn. 2015) (emphasis added), cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A., 136 S. Ct. 2511, 195 L. Ed. 2d 841 (2016) (quotations omitted) (citing Goodyear Dunlop Tires Ops, S.A. v. Brown, 564 U.S. 915, 131 S. Ct. 2846, 2853 (2011)) (explaining that specific personal jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation"). "Specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" Goodyear, 131 S. Ct. at 2851.

Consistent with the above reasoning, in Southern Machine Co. v. Mohasco Industries, Inc., the Sixth Circuit established a three-part test for determining whether the exercise of specific jurisdiction was consistent with the principles of due process:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequence caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

401 F.2d 374, 381 (6th Cir.1968). Although purposeful availment is an "indispensable" element of specific personal jurisdiction, a motion to dismiss may also be maintained on prongs two and

three. See Capital Confirmation, Inc. v. Auditconfirmations, LLC, No. 3:09-0412, 2009 WL 2823613, at *5 (M.D. Tenn. Aug. 28, 2009).

Regarding the first prong (purposeful availment), the defendant's connection with a particular forum must be not only intentional, but also "substantial" enough to give rise to jurisdiction. See Walden v. Fiore, 571 U.S. __, 134 S. Ct. 1115, 1121 (2014). "The placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum state." Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty., 480 U.S. 102, 112 (1987) (emphasis added).

In First Community Bank, the Tennessee Supreme Court held that the plaintiff "failed to demonstrate contacts between [specific defendants] and the State of Tennessee with reasonable particularity sufficient to establish a prima facie case of specific jurisdiction in Tennessee." 489 S.W.3d at 394. There the plaintiff's basis for asserting personal jurisdiction was that it was "reasonably foreseeable that all Defendants . . . knew that purchases of these investment products would occur in Tennessee and the fraudulent misrepresentations and omissions would cause tortious harm in Tennessee." Id. at 390. The Supreme Court rejected that argument and held that, without more, such general allegations were insufficient to establish purposeful availment. Id. "Plaintiff must establish some additional facts to show that [defendants'] conduct giving rise to the instant litigation was *directed toward and sufficiently connected to the State of Tennessee*." Id. at 391 (emphasis added).

Similarly, the Complaint in the present case fails to allege any specific facts sufficient to establish specific jurisdiction in Tennessee. Plaintiff's general allegation that Defendants should have expected their acts to have consequences in Tennessee is missing the something "more" required by both Asahi and First Community Bank.

As to the second Mohasco factor (that the cause of action arose from Defendant's actions in Tennessee), the Complaint is devoid of any specific allegations linking Pepper (or the executor of Plaintiff's estate, for that matter) to Tennessee.

Regarding the third Mohasco factor (whether the exercise of jurisdiction would be reasonable), Sixth Circuit has identified the following factors for courts to consider, among others: "(1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) other states' interest in securing the most efficient resolution of the policy." Air Products and Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 554–55 (6th Cir. 2007). Here, it would be unreasonable for this Court to exercise jurisdiction over Pepper, as explained in the Declaration of Lee Paynter, the COO at Pepper (filed contemporaneously herewith).

As Mr. Paynter explains, Pepper has no registered agent for service in Tennessee, no employees here, it owns no real estate here, leases no property here, has no office here, and is not registered with the Tennessee Secretary of State. See Paynter Decl. at ¶¶ 4-9. Any royalty payments from that Pepper is obligated to pay are paid from its offices in Pennsylvania. Id. at ¶ 10. Any correspondence to Pepper concerning copyrights and/or royalties would be directed to its Pennsylvania office. Id. at ¶ 11. Similarly, any correspondence from Pepper concerning copyrights and/or royalties would originate from its Pennsylvania office. Id. Pepper has no witnesses or documents located in Tennessee. Id. at ¶ 12.

For all these reasons, the Court should dismiss the case against Pepper for lack of personal jurisdiction under Rule 12(b)(2).

B. Improper Venue

On a motion to dismiss for improper venue, the plaintiff bears the burden of proving that venue is proper. Oakley v. Remy Int'l, Inc., No. 2:09-0107, 2010 WL 503125, at *2 (M.D. Tenn. Feb. 5, 2010) (unpub'd). No deference is given to legal conclusions. See Benton v. Bank of Am. Corp., 159 F. Supp. 3d 89, 91 (D.D.C. 2016).

"Venue refers to the place where a lawsuit should be heard and is, thus, different from the question of jurisdiction." Union Planters Bank, N.A. v. EMC Mortg. Corp., 67 F. Supp. 2d 915, 917 (W.D. Tenn. 1999). "Venue primarily concerns the convenience of the forum for the parties." Id. (citing Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979)). Venue is designed "to protect the defendant against the plaintiff choosing an unfair or inconvenient place of trial." Id. (citing Leroy, 443 U.S. at 183–84).

Where a case involves multiple defendants, venue must be proper as to each defendant. See Overland, Inc. v. Taylor, 79 F. Supp. 2d 809, 812–13 (E.D. Mich. 2000). Even where it could be considered that venue is proper over one defendant, "venue must be proper with respect to *all* Defendants," which the plaintiff must demonstrate. Id. Stated differently, "venue must be proper for each claim and as to each defendant in order for the court to retain the action." Verbis v. Iowa Dep't of Human Servs., 18 F. Supp. 2d 770, 774 (W.D. Mich. 1998).

Here, without citing any specific facts, Plaintiff asserts the legal conclusion that venue is proper in this Judicial District. See Complaint at ¶ 3. Plaintiff relies on 28 U.S.C. §§ 1400(a) and 1391(b)-(c). As set forth below, none of these statutes provide support for the exercise of venue over Pepper in this Judicial District

Section 1391(b) provides that a civil action may be brought in:

> (1) a judicial district in which any defendant *resides*[3], if all defendants are residents of the State in which the district is located;
> (2) a judicial district in which a *substantial* part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is *subject to the court's personal jurisdiction* with respect to such action.

28 U.S.C. § 1391(b) (emphasis added). Here the Complaint does not allege any facts that support venue under Section 1391(b). Pepper does not reside here and the Complaint fails to allege that a substantial part of the events/omissions giving rise to Plaintiff's claims occurred here.

Section 1400(a) provides no basis for venue in this action since it limits jurisdiction to districts in which a defendant resides or may be found. It states: "Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent *resides* or may be found." 28 U.S.C. § 1400(a) (emphasis added). Pursuant to Section 1391(c), a corporation is deemed to reside in any district "in which it is subject to personal jurisdiction." Here, as set forth above, the Court lacks personal jurisdiction over Pepper. And there are no allegations in the Complaint that Pepper may be found in this Judicial District. Accordingly, venue in this Judicial District is improper.

C. Conclusion

For the reasons stated above, the Court should dismiss the Complaint against Pepper for lack of personal jurisdiction and for improper venue.

[3] Section 1391(c), in pertinent part, defines "residency" for venue purposes as: "(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is *subject to the court's personal jurisdiction* with respect to the civil action in question . . . ." 28 U.S.C. § 1391(c) (emphasis added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document, on February 2, 2017, via ECF, on:

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